

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO.,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652813/2012 **E**

Hon. Andrea Masley

DISCOVER PROPERTY & CASUALTY
COMPANY, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652933/2012 **E**

**INSURERS' MEMORANDUM OF LAW SEEKING PARTIAL REVIEW OF THE
FEBRUARY 26, 2019 MEMORANDUM AND ORDER OF SPECIAL REFEREE
MICHAEL DOLINGER REGARDING THE NFL PARTIES' MOTION TO COMPEL**

(Reinsurance and Reserves)

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I. PRELIMINARY STATEMENT

Pursuant to CPLR § 3104(d), the Insurers¹ respectfully submit this application seeking review of certain portions of the Special Referee's February 26, 2019 Memorandum and Order pertaining to the NFL Parties' Motion to Compel. As set forth below, the Insurers respectfully submit that Special Referee Dolinger erred in ordering the Insurers to produce information relating to reinsurance agreements, communications with reinsurers and reserves.

For the reasons set forth herein, and in the original motion papers before Special Referee Dolinger filed herewith², the Insurers request that the Court reverse the Special Referee's rulings on these specific issues.

II. REINSURANCE INFORMATION

Special Referee Dolinger incorrectly concluded that, under New York law, the Insurers are required to produce reinsurance information to the NFL Parties.³ Such confidential and proprietary documents are irrelevant to the subject matter of this action and, therefore, they are neither material nor necessary to the claims and defenses asserted in this Coverage Action. In particular, Special

¹ A complete list of the Insurers is attached as Exhibit A to the Affirmation of Kevin J. O'Connor, Esq. ("O'Connor Aff."). The Insurers incorporate herein the Factual Background and Standard of Review sections of the appeal to the Court filed regarding the Insurers' Motion to Compel Underlying Litigation and Settlement Materials.

² See, O'Connor Aff. Exhibit B, C and D.

³ Specifically, Special Referee Dolinger ruled that the NFL Parties were entitled to the Insurers' "reinsurance policies and their correspondence with their reinsurers." Referee's Memorandum & Order, at 74. A copy of this Memorandum & Order has been filed with the Court.

Referee Dolinger's ruling is improper on the grounds that: (1) it incorrectly finds that CPLR 3101(f) requires the production of reinsurance agreements in *all* insurance coverage disputes filed in New York state court, regardless of whether such documents are even relevant; and (2) it incorrectly finds that the confidential and proprietary reinsurance information sought by the NFL Parties is material and necessary to the prosecution or defense of this Coverage Action. Finally, even assuming *arguendo* that the reinsurance information sought by the NFL Parties is discoverable, the Requests are not properly limited in time.

A. Special Referee Dolinger Incorrectly Held That CPLR 3101(f) Requires an Insurer to Produce Reinsurance Policies in the Context of a Coverage Dispute.

Special Referee Dolinger incorrectly held that “[t]he production of the reinsurance policies themselves is seemingly mandated by section 3101(f), and in fact the First Department has so held.” Referee’s Memorandum & Order, at 75. Contrary to this assertion, New York law does not apply such a *per se* rule under CPLR 3101(f) - - requiring insurers to produce copies of their reinsurance agreements to policyholders whenever an insurance action is filed - - and, indeed, no New York court has ever applied such a rigid interpretation of this statute.

Special Referee Dolinger relies on two decisions - - Anderson and Clarendon - - in finding that CPLR 3101(f) “seemingly” mandates production of reinsurance agreements in all insurance coverage actions. Neither of these cases, however, involves the production of reinsurance information *by an insurer in the context of an insurance coverage dispute*. Anderson v. House of Good Samaritan Hosp., 767 N.Y.S.2d 330, 331 (4th Dep’t 2003) (holding defendant doctors required to produce reinsurance agreements in medical malpractice action); and Clarendon Nat’l Ins. Co. v. Atlantic Risk Mgt., Inc., 873 N.Y.S.2d 69, 70 (1st Dep’t 2009) (finding insurer required to produce reinsurance agreements in reimbursement lawsuit against claims adjuster).

In Anderson, the plaintiff filed a medical malpractice action against the defendants - - all of which were doctors or health care facilities (not insurers) - - alleging that they “misdiagnosed a rare neurological disease.”⁴ In addition to seeking copies of the defendants’ primary and excess insurance policies, the plaintiff also moved to compel copies of certain reinsurance agreements on the grounds that one of the defendant doctor’s primary insurers was “under motion for liquidation in a reorganization proceeding” and, therefore, the reinsurance company was the “real payor” with respect to the plaintiff’s claim.⁵ In this very specific factual scenario, where one of the defendant’s insurance carriers was in the process of liquidation and therefore likely not able to pay its policy obligations, the court concluded that the plaintiff was also entitled to production of any reinsurance agreements in the defendant’s possession.

Similarly, Clarendon did not involve the production of reinsurance agreements in a coverage action between an insurer and one of its policyholders. There, an insurer filed a lawsuit seeking reimbursement costs from a defendant third-party claims administrator, ARM. The lawsuit alleged that ARM failed to perform under a claims administrator agreement between the

⁴ Brief of Defendant-Respondent Mercy Hospital, Anderson v. House of Good Samaritan Hosp., 2003 WL 25707980 (O’Connor Aff., Exhibit E).

⁵ Brief of Defendant-Respondent Santana, Anderson v. House of Good Samaritan Hosp., 2003 WL 25660444 (O’Connor Aff., Exhibit F); see also Brief of Plaintiff-Appellant Anderson, Anderson v. House of Good Samaritan Hosp., 2003 WL 25660445 (O’Connor Aff., Exhibit G) (noting that defendant’s “primary insurance carrier, Legion Insurance Company, is in reorganization proceedings” in support of argument that plaintiff “is entitled to copies of [the defendant’s] reinsurance policy”).

parties when it improperly denied coverage to one of the insurer's policyholders, without adequately investigating whether coverage was available under the policies. As a result, the insurer allegedly suffered millions of dollars in damages stemming from a trial verdict against the undefended policyholder.⁶ ARM filed a motion to compel the insurer's reinsurance agreements arguing that they were relevant to the calculation of the insurer's *actual losses*. Specifically, ARM argued:

If the underlying . . . settlement was covered by insurance or reinsurance, then [the insurer] has no business trying to "recoup" these "non-losses" from ARM. As indicated above, a defendant, such as ARM, is surely entitled to discovery to determine what its true liability to plaintiff (Clarendon) might be.⁷

Thus, the reinsurance agreements in Clarendon were relevant to the issue of whether the plaintiff suffered any *actual loss* in providing coverage for the underlying settlement - - not with respect to any coverage dispute between an insurer and a policyholder. In this regard, the court held that "*with respect to the claims at issue in this litigation*, CPLR 3101(f) entitles defendant to copies of

⁶ Complaint, Clarendon Nat'l Ins. Co. v. Atlantic Risk Mgt., Inc., 2006 WL 8087236 (O'Connor Aff., Exhibit H).

⁷ Reply Brief of Plaintiff-Respondent, Clarendon Nat'l Ins. Co. v. Atlantic Risk Mgt., Inc., 2008 WL 8162171 (O'Connor Aff., Exhibit I); see also Brief of Defendant-Appellant, Clarendon Nat'l Ins. Co. v. Atlantic Risk Mgt., Inc., 2008 WL 8162169 (O'Connor Aff., Exhibit J) (arguing "ARM is surely entitled to force Clarendon to set forth proof of its actual damages, that is, whether it paid these sums out of its own pocket. If, for example, some insurer or reinsurer ultimately bore the cost of resolving the underlying matters, then Clarendon would be attempting to engineer an inappropriate windfall in seeking 'recovery' for a nonexistent 'loss' from ARM.").

the applicable reinsurance policies themselves.” Clarendon, 873 N.Y.S.2d at 70 (emphasis added). Importantly, neither Anderson nor Clarendon involve the production of reinsurance policies *by an insurer in the context of an insurance coverage dispute*.

Moreover, at least one New York court has expressly rejected the argument that Anderson stands for the sweeping proposition that CPLR 3101(f) requires an insurer to produce reinsurance agreements in the context of an insurance coverage dispute. Mt. McKinley Ins. Co. v Corning Inc., 2010 WL 6334283, at *1 (N.Y. Sup. Ct. Feb. 25, 2010). Special Referee Dolinger disregarded the holding in Mt. McKinley on the erroneous grounds that the “court did not explain the basis for its apparent rejection of the applicability of the statute” and that “the court failed to distinguish or explain away the Anderson holding or address the Clarendon ruling.”⁸ In fact the court in McKinley did explain its rejection of the statute on the grounds that CPLR 3101(f) - - which may permit the production of reinsurance agreements in certain limited circumstances - - does not apply to the production of reinsurance policies in a case where they are not actually relevant to the issues at hand, such as in a typical coverage action between an insurer and a policyholder. Id. at *12. Moreover, the court directly addressed the holding in Anderson and properly held that while CPLR 3101(f) *may* “permit[] discovery related to reinsurance policies . . . Anderson . . . does not set forth a broad rule and is limited to the facts of the case - from which there are few to draw any reasoning from.” Id. The court further held that

[The insured] attempts to apply an overly broad reading of Anderson - one that effectively embraces a per se rule that reinsurance agreements are relevant. That [the insured] relies on an attenuated interpretation of Anderson and fails to assert the relevance between reinsurance information and a material issue in this action belies its contention that the discovery sought is relevant.

⁸ Referee’s Memorandum & Order, at 75, fn 59.

Id. Similarly, in this case, Special Referee Dolinger's reading of the Anderson and Clarendon cases embraces a *per se* rule that simply does not exist under New York law. Because the Order is supported by neither the evidence nor the law, it should be overruled.

B. Special Referee Dolinger Incorrectly Found that the Insurers' Reinsurance Information is Discoverable Under New York Law.

Relying solely on an unpublished decision from the Eastern District of Louisiana - - Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am., No. CIV.A. 06-4262, 2009 WL 1247122 (E.D. La. May 5, 2009) - - Special Referee Dolinger improperly found that the Insurers' communications with their reinsurers are somehow relevant to the NFL Parties' bad faith claims against certain of the Insurers. In Imperial Trading, the Eastern District of Louisiana addressed whether reinsurance information is relevant to an insured's claims against an insurer for *bad faith claims handling* on the grounds that the insurer "failed to participate in the adjustment process in good faith" and held that such information might be relevant to the insurers' "handling of plaintiffs' claims." Id. at *1-3. Here, however, the NFL Parties have alleged only "Bad Faith Refusal to Consent to the Class Settlement" against only certain of the Insurers and they have *not* alleged any claims against the Insurers for failure to handle the NFL Parties' claims in good faith.⁹ Thus, Imperial Trading is neither applicable to, nor controlling of, the present case.

Special Referee Dolinger also incorrectly held that the reinsurance information sought by the NFL Parties may be relevant to the Insurers' "failure to disclose" defenses, relying primarily on Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York, 284 F.R.D. 132 (S.D.N.Y. 2012). In Fireman's Fund, the court held that reinsurance information was potentially relevant on the

⁹ NFL Parties' Amended Answer to Amended Complaint and Second Amended Counterclaims and Cross-Claims, ¶¶ 94-100.

narrow grounds that it might contain “a rating formula to decide how to price the insurance” which would be relevant to whether the insurer took into consideration the “age and condition” of a specific dry dock insured under the insurance policy. Id. at 137. In this case, the Insurers’ “failure to disclose” defenses are based on the of facts regarding what the NFL Parties knew about concussions and related neurocognitive injuries in football and whether they properly disclosed such information to their Insurers. Thus, unlike Fireman’s Fund - - which involved an insurer’s knowledge of a single dock - - the Insurers have not asserted any “failure to disclose” defense which could be proven right or wrong by the disclosure of a “rating formula.” This case is, therefore, inapplicable here.

In addition, Special Referee Dolinger improperly disregards the fact that, even if the reinsurance information sought by the NFL Parties was relevant to the coverage issues in this case - - which it is not - - these materials are confidential and potentially protected by the work product doctrine, the common interest doctrine and the attorney-client privilege.

While Special Referee Dolinger correctly notes that the confidentiality order in this case will protect the reinsurance materials from being disclosed to the public, he ignores the primary reason why such a confidentiality order is insufficient here - - namely, it will not protect confidential information of the Insurers from disclosure to each other. See Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 139 F.R.D. 609, 612 (E.D. Pa. 1991) (noting that “reinsurance materials contain confidential business information regarding the pricing and coverage of reinsurance policies, which, if revealed to competitors, including (co-defendants herein) could damage the insurance carriers ability to compete in the reinsurance market as well as harm present business relationships with reinsurers”). The same is true here.

Lastly, even assuming *arguendo* that certain of the reinsurance information sought by the NFL Parties in this case is discoverable, Special Referee Dolinger improperly fails to limit the scope of the NFL Parties' Request, which includes reinsurance communications after the commencement of the present Coverage Action. Any analysis or information provided to the reinsurers since this Coverage Action was initiated - - over six years ago - - was necessarily created in the course of litigation and/or with the assistance of counsel. Accordingly, Special Referee Dolinger did not properly limit the scope of his ruling to reinsurance communications dated *prior* to the commencement of this Coverage Action.

III. RESERVE INFORMATION

Special Referee Dolinger agrees that the Insurers' reserve information generally is not discoverable. His order requires that such information be produced only from those Insurers against whom the NFL has asserted a bad faith claim. Special Referee Dolinger's finding that reserve information is discoverable because it is potentially relevant to the NFL Parties' "bad faith" claims and the Insurers' defenses relating to whether the underlying class action settlement was reasonable is contrary to New York law and should be reversed. Further, even if a limited exception to the New York rule that reserves are not discoverable did exist, that exception would not apply under the facts of this case.

A. Reserves Are Not Discoverable Under New York Law.

New York state trial courts long have recognized that an insurer's reserve information is not discoverable. In Gold Fields Am. Corp. v. Aetna Cas. & Sur. Co., No. 19879/89, 1994 N.Y. Misc. LEXIS 709 (Sup. Ct., N.Y. Cty. Feb. 24, 1994), the court conducted an analysis of cases from New York state court and other jurisdictions, and concluded that denying discovery of reserve information was the "more sound" position. Id. at *15. Quoting from an earlier decision of a sister

trial court, the court explained the purpose of reserve setting and the irrelevance of it to insurance coverage disputes:

Many factors enter into the setting of loss reserves, including statutory and regulatory requirements, preliminary and very general estimates of potential liability, taking into consideration alternative court rulings and litigation costs, and general economic considerations, among other factors [Such information] would in all likelihood not be admissible to show [the insurer's] interpretation of policy language.

Borg-Warner Corp. v. Liberty Mut. Ins., Index No. 539/88, (Sup. Ct. Tompkins Cty., N.Y. June 20, 1990). Additionally, the Gold Fields court found that important public policy considerations weighed against allowing discovery of reserve information:

[T]here is an important public interest in the establishment of sound reserves by insurance companies. The financial integrity of insurance companies is vital to the economy, and the failure in recent years of many companies, including some insurers, serves as a reminder of what is at stake. The pensions and life insurance of millions of ordinary citizens are invested with these companies. It would be unhealthy if the setting of a particular reserve would be allowed to be presented before the jury in a litigation such as this as an admission of possible liability. In any event, the admission of possible liability proves almost nothing and would lead to extended battles

Gold Fields, 1994 N.Y. Misc. LEXIS 709, at *16. Justice Shackman's decision regarding reserves in Gold Fields has not been disturbed by any New York state court in the over two decades since its issuance.

New York law on this issue is in accord with the law of other jurisdictions throughout the country. See, e.g., Signature Dev. Cos. v. Royal Ins. Co. of Am., 230 F.3d 1215, 1224 (10th Cir. 2000) (reserve calculation is merely an amount set aside to cover potential future liabilities; it is not a discoverable admission of insurer's liability); Leksi, Inc. v. Federal Ins. Co., 129 F.R.D. 99, 106 (D.N.J. 1989) ("A reserve essentially reflects an assessment of the value of a claim taking into consideration the likelihood of an adverse judgment and such estimates of potential liability do not normally entail an evaluation of coverage based upon a thorough factual and legal consideration

when routinely made as a claim analysis. The purpose of discovery -- expedition of the litigation by narrowing the area of controversy or by avoiding unnecessary testimony or by providing a lead to evidence -- will not be served by allowing discovery of reserves.”); Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 117 F.R.D. 283, 288 (D.D.C. 1986) (denying production of reserves as “information of very tenuous relevance, if any relevance at all” to a coverage dispute); Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 139 F.R.D. 609, 613-14 (E.D. Pa. 1991) (finding reserve information irrelevant “as well as constituting work product material” that may reflect attorney-client privileged communications); Monsanto Co. v. Aetna Cas. & Sur. Co., C.A. No. 88C-JA-118 (Del. Super. Ct. 1990) (“Both a lack of relevancy and the introduction of extraneous issues are at odds with the discovery of reserves information”).

B. The Insurer’s Reserves Are Not Made Discoverable By the NFL Parties’ Bad Faith Claims.

Special Referee Dolinger erred when he ruled that the existence of the NFL Parties’ bad faith claims rendered the Insurers’ reserve information discoverable. Courts around the country have rejected the notion that production of reserve information is appropriate where bad faith claims have been asserted. See, e.g., Fidelity & Deposit Co. v. McCulloch, 168 F.R.D. 516, 525 (E.D. Pa. 1996) (“We fail to see how compelling production of reserve information would bring [plaintiff] any closer to proving bad faith on [the insurer’s] part.”); Am. Protection Ins. Co. v. Helm Concentrates, Inc., 140 F.R.D. 448, 450 (E.D. Cal. 1991) (reserve information not discoverable even when insured maintained that insurer acted in bad faith in denying claim).

The legal underpinning for Special Referee Dolinger’s decision is a series of cases addressing production of reserve information in situations where an insurer failed to settle a claim within policy limits or refused to fund or pay a settlement or other loss of a known amount and the insured later alleged that refusal was made in bad faith. The courts in those cases permitted reserve

discovery on the theory that a comparison of a single insurer's loss reserve with the amount of the settlement was potentially relevant to whether or not that the insurers acted in good faith. See, e.g., National Union Fire Insurance Co. v. H&R Block, Inc., 2014 WL 4377845, *3-5. For that line of cases to have any bearing on the discovery of reserves, two conditions would need to exist. The first is a settlement demand or settlement opportunity made or presented to an insurer in a fixed amount. The second is the existence of a reserve established at that time by that insurer, on a particular claim or claims, with which to compare the settlement demand.

These cases do not support production of reserve information by any of the Insurers in this case because no such comparison of a settlement amount or opportunity with a contemporaneous reserve amount is possible. When raised with the Insurers in 2015, the underlying MDL settlement was not a settlement with any known amount. Rather, the NFL Parties negotiated an uncapped settlement program, the ultimate value of which was unknown and could not be determined or estimated with any degree of certainty. The number and identity of the claimants were unknown (at least in large part) and the amounts to be paid to claimants were unknown. Indeed, estimates made and disclosed to the Insurers at the time the NFL Parties addressed Insurer consent have proven to be wildly inaccurate.¹⁰ The amount of any Insurer's alleged liability for claims to be

¹⁰ See, Co-Lead Class Counsel Christopher A. Seeger's Status Report with Updated Actuarial Analysis, with attachments, In Re: National Football League Players' Concussion Injury Litigation, C.A. No. 2:12-md-02323-AB, O'Connor Aff., Exhibit K.

paid under the agreement was unknown.¹¹ How the settlement costs were to be allocated between the NFL and NFL Properties, Inc. was also unknown.

Second, unlike in the cases relied upon by Special Referee Dolinger, here each of the Insurers can only be potentially responsible for a share of the unknown overall settlement amount, assuming the NFL Parties otherwise demonstrate coverage for particular claims. Presumably, any reserve established by each Insurer would reflect only an estimate of that share. Accordingly, even if the MDL settlement were for a fixed or determinable amount, comparison of that amount with each Insurer's relevant loss reserve would be meaningless. At most, production of reserve information would lead to extensive, expensive and ultimately futile side litigation over how the reserve was established and what it reflects. This case is complicated enough without the needless injection of additional issues.

C. At Minimum, Special Referee Dolingers' Order is Overly Broad.

Finally, even assuming *arguendo* that Special Referee Dolinger is correct that *some* reserve information is discoverable, his order is overly broad and any production of documents should be

¹¹ Indeed, the NFL Parties still are unable to tell any of the Insurers what share of the MDL Settlement costs each is obligated to pay. They successfully resisted the Insurer's motion to compel that information, by arguing it only could be established by expert testimony at a later phase of this case.

limited to reserve information existing at the time certain Insurers declined to waive the defense of lack of consent for the MDL settlement.¹²

The NFL Parties' claims are that (1) the refusal to waive lack of consent as a defense to coverage for the MDL settlement was made in bad faith and (2) that examination of the reserves set by the Insurers, presumably at the time of that refusal, will help prove that. Clearly, reserves existing before or after the time of any Insurer's refusal are not even potentially relevant and should not be ordered to be produced.

Dated: March 14, 2019

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¹² That date may vary to a degree between Insurers. The Settlement was approved by the MDL court in June, 2015. Generally, discussions between the NFL Parties and the Insurers over consent occurred in 2014 and early 2015.